BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DONALD W. RAYBERN	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,070,350
KMW LIMITED	)	
Respondent	)	
AND	)	
	)	
ACCIDENT FUND GENERAL INSURANCE	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the August 8, 2014, preliminary hearing Order entered by Administrative Law Judge (ALJ) Bruce E. Moore.

APPEARANCES

Robert R. Lee, of Wichita, Kansas, appeared for the claimant. Ronald J. Laskowski, of Topeka, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has adopted the same stipulations and considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing from August 8, 2014, with exhibits attached and the documents of record filed with the Division.

ISSUES

The ALJ denied claimant's preliminary hearing requests, finding claimant failed to sustain his burden of proof that appropriate notice was provided and failed to establish personal injury by repetitive trauma. The ALJ further determined that claimant failed to prove that repetitive trauma from work activities constitutes the prevailing factor causing claimant's injury, medical condition, need for treatment or resulting impairment or disability.

Claimant appeals arguing he injured his right shoulder by repetitive trauma beginning February 7, 2014,[1] and continuing each and every working day thereafter. Claimant contends the date of accident by repetitive trauma is May 6, 2014, the day claimant's physician asked him to avoid heavy lifting and the day he was told he needed surgery to repair his rotator cuff. Claimant argues he gave respondent timely notice of his injury. Claimant asks the Board to find his claim compensable and authorize treatment with Dr. Sotelo.

Respondent argues the ALJ's Order should be affirmed.

The issues on appeal are:

1. Is claimant's injury and need for treatment the result of a single traumatic accident or repetitive trauma?

2. What is the date of injury?

3. Did claimant give timely notice?

3. Is the accident or repetitive trauma the prevailing factor causing the injury and need for treatment?

FINDINGS OF FACT

Claimant has worked for respondent for four years as a maintenance man. Claimant alleges injury to his right shoulder as a result of his work activity. Claimant believes he first injured his shoulder on February 7, 2014, while he and another maintenance man were pulling an auger out of the shop blaster. The auger dropped, smashing his hand. Claimant had immediate pain and swelling in his hand. The accident occurred on a Saturday. By Monday claimant had pain in his right shoulder, but was focused more on his hand at the time. After a couple of days claimant's hand healed. He did not report his hand injury because it was not uncommon to get cuts, scrapes and bangs in his line of work. Claimant continued to perform his regular work. The more claimant worked the more his shoulder hurt, but he didn't think much of it because muscle aches and pains go with the job.

Claimant went to physician's assistant (PA) Phillip Barnes on February 13, 2014, for respiratory problems, but did not mention either his hand or his shoulder. The first time

[1] The E-1 filed in this matter lists February 7, 2014, as the date of accident. Various other documents in this record also list February 8, 2014, as the date of accident. At the preliminary hearing, claimant announced the date of accident as February 7, 2014. For consistency purposes, this Order will use February 7, 2014, as the date of accident.

claimant mentioned his shoulder pain was on April 11, 2014, while he was getting a wellness exam with PA Barnes. During the course of that visit, claimant was asked about any pain he may be having and claimant mentioned his right shoulder pain. By history, claimant's shoulder pain had been present for approximately two months. The report did not mention a gradual worsening of the shoulder pain. Claimant was put through range of motion testing for his right arm and it was determined he had more than just a muscle pull in his arm. He was referred to and received approval to see Abelardo Sotelo, M.D. Claimant reported to his boss, Richard Benson, that he had more than a pulled muscle in his shoulder and was being referred to a specialist.

Claimant was examined by Dr. Sotelo on April 15, 2014, at which time the doctor ordered an MRI of claimant's shoulder. The MRI, completed on April 28, 2014, indicated claimant had a torn rotator cuff. The history provided to Dr. Sotelo indicated an onset two months prior, but no aggravation. Range of motion testing displayed a decrease of about 20 percent, a marked positive drop sign and mildly positive impingement sign. Claimant was advised by Dr. Sotelo on May 6, 2014, that he had a torn rotator cuff and would need surgery to repair the damage. Claimant believed he had a pulled muscle and treated it as such until he was told by Dr. Sotelo he needed surgery.

Claimant testified his condition has changed drastically since April 11, 2014, in that there are now things he is unable to do and the pain keeps him from sleeping well. On May 6, 2014, claimant was instructed by Dr. Sotelo to avoid heavy lifting and try to avoid lifting anything over ten pounds. Claimant testified he is now having trouble performing his job. Claimant reported that the longer he works the less range of motion he has in his shoulder. He can no longer lift his arm forward or sideways.

Claimant testified he didn't initially report his hand and shoulder injuries because, at the time, he didn't think they were that serious. It wasn't until his shoulder got worse that he felt he needed to report it. Claimant understood that, had he reported his injury when it happened in February, he would have been sent to a doctor. But he did not believe that had he been sent to a doctor sooner and been given restrictions, he would have been accommodated.

Richard Benson, respondent's manufacturing engineering manager and claimant's supervisor, testified that he and claimant talked either in person or over the phone at least three times a day. He first learned of claimant's shoulder injury after claimant had been to see Dr. Sotelo. Mr. Benson admitted claimant periodically reported that his shoulder was sore, but he couldn't remember the dates when this occurred. He later testified it was after the accident report had been filled out that claimant discussed a problem with his shoulder. He testified that had claimant reported an accident and injury, an accident report would have been filled out and claimant may have been sent to a doctor. Respondent's Exhibit No. 2, the Accident Investigation Report, was filled out and signed by Mr. Benson, on April 15, 2014, and signed by claimant on April 17, 2014.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2013 Supp. 44-501b(a)(b)(c) states:

(a) It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the act. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.
(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2013 Supp. 44-508(d)(e) states:

(d) "Accident'' means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident'' shall in no case be construed to include repetitive trauma in any form.
(e) "Repetitive trauma'' refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury.
"Repetitive trauma'' shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.
In the case of injury by repetitive trauma, the date of injury shall be the earliest of:
(1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;
(2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;
(3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related;
or
(4) the last day worked, if the employee no longer works for the employer against whom benefits are sought. In no case shall the date of accident be later than the last date worked.

K.S.A. 2013 Supp. 44-508(f)(1)(2)(3)(A) states:

> (f)(1) "Personal injury'' and "injury'' mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
> (2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.
> (A) An injury by repetitive trauma shall be deemed to arise
> out of employment only if:
> (i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;
> (ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and
> (iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.
> (B) An injury by accident shall be deemed to arise out of employment only if:
> (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
> (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.
> (3)(A) The words "arising out of and in the course of employment'' as used in the workers compensation act shall not be construed to include:
> (i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
> (ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
> (iii) accident or injury which arose out of a risk personal to the worker; or
> (iv) accident or injury which arose either directly or indirectly from idiopathic causes.

K.S.A. 2013 Supp. 44-508(g) states:

> (g) "Prevailing'' as it relates to the term "factor'' means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor'' in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

The ALJ did not identify a specific date of accident in this matter. The Order of August 8, 2014, did, however, find claimant had failed to establish personal injury by repetitive trauma. Claimant's allegations of injury included a specific trauma on February 7, 2014, followed by repetitive trauma thereafter. By finding claimant failed to prove personal injury by repetitive trauma, the ALJ effectively limited claimant's claim to a specific trauma on February 7, 2014.

This Board Member agrees with the ALJ's analysis on the date of accident issue. Claimant testified to a worsening of his shoulder condition while continuing to work for respondent. However, the medical records in this matter do not support claimant's contentions of repetitive microtraumas. The reports from PA Barnes and Dr. Sotelo describe only the specific traumatic lifting accident on or about February 7, 2014. Claimant has failed to prove he suffered personal injury by repetitive trauma after February 7, 2014. As such, claimant also failed to establish the non-existent repetitive trauma was the prevailing factor causing claimant's injuries. The Order of the ALJ is affirmed on this issue.

K.S.A. 2013 Supp. 44-520 states:

> (a) (1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:
> (A) 20 calendar days from the date of accident or the date of injury by repetitive trauma;
> (B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or
> (C) if the employee no longer works for the employer against whom benefits are being sought, 10 calendar days after the employee's last day of actual work for the employer.
> Notice may be given orally or in writing.
> (2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.
> (3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.
> (4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.
> (b) The notice required by subsection (a) shall be waived if the employee proves that: (1) The employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.
> (c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

The ALJ ruled claimant failed to provide appropriate notice of the accident. Claimant acknowledges he did not report the incident on February 7, 2014, until it became more painful and he determined he needed to see a doctor. This did not occur until his medical examination with PA Barnes on April 11, 2014. Claimant had 20 days from the date of accident to satisfy the notice requirements of the statute. Claimant failed to do so. The denial of benefits by the ALJ due to claimant's failure to timely provide notice of the accident to respondent is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[2] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed. Claimant has failed to prove he suffered injury by repetitive trauma or that the repetitive trauma was the prevailing factor leading to his current injuries and need for medical treatment. Additionally, claimant failed to provide timely notice of the accident on February 7, 2014.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Bruce E. Moore dated August 8, 2014, is affirmed.

[2] K.S.A. 2013 Supp. 44-534a.

IT IS SO ORDERED.

Dated this _____ day of October, 2014.

_____
HONORABLE GARY M. KORTE
BOARD MEMBER

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Bruce E. Moore, Administrative Law Judge